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No. 90-900

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioners,

vs.

THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF THE CHURCH OF ST. PAUL AND ST.
ANDREW AS AMICUS CURIAE IN SUPPORT OF
PETITIONER'S PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

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INTRODUCTION

The Church of St. Paul and St. Andrew, 263 West End Avenue, New York, New York, submits this brief as *amicus curiae* in support of the application of petitioners The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church, for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF THE AMICUS

The Church of St. Paul and St. Andrew is a United Methodist church congregation located at the corner of West End Avenue and West 86th Street, Manhattan. Its church building was designated a landmark in 1981 over the strong objections of the congregation. Despite the severely deteriorated condition of that building and the Church's almost total lack of funds to renovate or merely maintain the building, the Landmarks Preservation Commission has strenuously, and so far successfully, opposed - in the New York courts and thereafter in a hardship proceeding before the Commission - the efforts of the Church to obtain permission to replace the decayed structure.

The Commission's opposition to the Church of St. Paul and St. Andrew reflects the Commission's policy that, regardless of the physical and financial hardship imposed on a religious institution by a landmarked structure, the structure is to be preserved at all costs.

The Church of St. Paul and St. Andrew is deeply concerned for itself and for all other churches and religious institutions at the conclusion of the court of appeals in the proceedings below that the Supreme Court decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) permits landmark regulation to "'freeze' a church's property in its existing use and prevent the Church from expanding or altering its activities . . ." *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) at page 356. The Church of St. Paul and St. Andrew has been the victim of just such "freezing."

As this Court considers the petition for a writ of certiorari of St. Bartholomew's Church, we urge that the Court recognize that the confiscatory impact of the Landmarks Law on religious institutions is by no means limited to that particular church. The devastating experience of the Church of St. Paul and St. Andrew shows how that Law is unconstitutional as applied both to the Church of St. Paul and St. Andrew and to the petitioner herein.

SUMMARY OF ARGUMENT

The Church of St. Paul and St. Andrew occupies a large decaying building on the West side of Manhattan which dates back to 1897. The Church conducts an active program of religious worship and mission outreach, including programs for the hungry and homeless. All of these programs have been harmed and limited by the progressive deterioration of the structure, by growing safety problems, by major interior design deficiencies, and by the tremendous financial drain of just trying to maintain and operate the building. The Church has an endowment of less than \$100,000 and no means of renovating or restoring the building.

After much study the Church decided in 1980 that to survive as a religious congregation and carry out its mission and program it would have to demolish the structure and to put up a new building on the site, to provide safe, functional and economic facilities. The new structure was to include residential housing to fund the cost of construction and to help finance the operation of the new church facility.

The Landmarks Commission designated the existing structure a landmark in 1981 over the Church's strong objections that the designation would greatly harm the Church, was an unconstitutional taking and a substantial interference with the Church's religious programs. After costly litigation, the New York Court of Appeals held in a 4-3 decision that the Church's claim of an unconstitutional designation was premature and that the Church should first apply to the Commission for permission to rebuild, in a so-called "hardship" proceeding. *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, cert. denied, 479 U.S. 985 (1986).

In 1988 the Church filed a hardship proceeding with the Commission, and was strenuously opposed by two private agencies with close ties to the Commission: the Landmarks Conservancy and the Municipal Art Society. The Church's engineering study showed that more than \$8,000,000 were needed to make the existing structure safe and usable. A study by the New York

City Department of General Services essentially confirmed the Church's cost study by identifying total costs for repair and renovation of over \$6,000,000.

Although the proceeding showed the disastrous condition of the building and the Church's lack of financial resources, the Commission nevertheless denied the Church's hardship application by adopting the arguments of the Church's opponents, e.g., that the Church first ought to try to raise in the community the millions of dollars needed, or that the Church should try to earn money by renting out its worship facilities. The Church had already looked at all of those alternatives, and was left with absolutely no choice but demolition.

The Commission's hearing process, which denied any right of cross examination to the Church, was little more than an open town meeting, where the chief opponents presented fanciful alternatives to demolition. The Commission largely ignored the Church's extensive proof of the devastating impact of the condition of the building and the finances of the Church on the Church's religious and mission programs.

Since 1981, the financial costs to the Church of the Commission's hearings and hardship proceedings have totalled well over \$100,000, an enormous burden for an impoverished church. During those years the Church's building has further deteriorated, and emergency repairs alone have taken more funds from the Church's programs.

The effect of the Commission's actions has been to drain away the time, energy and minuscule funds of the Church of St. Paul and St. Andrew and to freeze the Church into its present structure and level of activities, thereby severely impairing its ability to carry out its religious purposes and its programs for the hungry and the homeless, and indeed threatening its continued existence. The Commission has effectively taken the bulk of the value of the Church's property (its only significant asset) for the Commission's purposes.

With its single goal of preserving the Church's building at all costs, the Commission has involved itself in the decision-making process of the Church of St. Paul and St. Andrew as to its programs and finances, thereby taking control of its property and becoming firmly entangled in its religious affairs. That same policy, implemented in the name of the Landmarks Law, has been applied in the present case against petitioner St. Bartholomew's Church.

The Church of St. Paul and St. Andrew is at the crossroads in determining its future. The Church *must* change. As stated above, it can not continue in its building as is, because of the safety hazards and tremendous costs. In essence, there are two courses of action open to it: (1) a new building allowing the Church both to survive and continue as a religious congregation with facilities and funds necessary to carry out its mission and community programs, or (2) a congregation forced to expend its time, energies, and funds to renovate, restore, maintain, and operate this landmarked building. The Church of St. Paul and St. Andrew is a Methodist Church congregation whose purposes are clearly stated in course #1 above. The effect of the Landmarks Commission's actions (as discussed in the Argument below) has been to force the Church to adopt course #2 above and thereby to change its religious purposes and programs. This is clearly an interference with its religious life and a coercion to adopt new religious priorities and practices.

The same result has been accomplished by the Commission with respect to the petitioner herein. We urge that the petition be granted.

ARGUMENT

Background.

The church building of the Church of St. Paul and St. Andrew, constructed in 1897, includes its sanctuary for worship and its parish house, at the northeast corner of West End Avenue and 86th Street, Manhattan. The congregation was founded in 1834, and the present structure is its third building.

As a congregation of the United Methodist Church, its purposes are to carry out a broad mission of religious worship and social ministry. In fulfilling that mission, the Church conducts within the building an extensive program of religious services as well as mission activities which include the Nutrition and Health Center, the West Side Campaign Against Hunger, the United Methodist Women program, young adult programs, bible study programs. This Church is well known as being in the forefront of those institutions which provide extensive human services to the community. For example, the two large feeding programs mentioned above together produce 6000 meals per week (or a total of 300,000 meals per year) for senior citizens, the homeless and shut-ins, which are delivered all over the City by a fleet of five trucks. In addition the Church runs a shelter for the homeless as well as extensive programs for young people and college students designed to provide an alternative to the crime and drugs all about them.

The interior design of the church building includes an enormous sanctuary and a huge concert hall, which, together, take up a disproportionate share of the church (80% of the total volume of program space). The building design reflected the needs of the Church when it was built in 1897. It does not meet the needs and purposes of this Church in the 1970s, 1980s or 1990s. There is little space for offices, meeting rooms, mission outreach program space, etc., all of which are acutely needed for the Church's programs and mission. There are no fire safety sprinkler systems or fire enclosed stairways. Portions of the building can no longer be used because of safety problems.

Over the years the church building had severely deteriorated, mainly because the building's limestone and terra cotta construction is highly susceptible to water damage. In the 1960s — long before the New York City Landmarks Preservation Commission showed any interest in the Church of St. Paul and St. Andrew — the Church began to consider the demolition of the current building and construction of a new building with adequate facilities as major repair needs grew far more urgent and costly. The roof and exterior walls and decorations in particular began to show signs of severe deterioration, presenting significant hazards to members and pedestrians.

The Church has a membership of about 200 and is a vital congregation which is slowly growing in numbers. The Church has never had a large endowment, and, accordingly, funds for renovations were generally raised by direct appeals to the congregation. In a campaign from 1967 to 1971 the Church raised about \$75,000, virtually all of which was paid out for repairs to the exterior and roof.

Despite these efforts, the deterioration of the church building accelerated. The Church simply could not generate the funds needed to cover the huge costs of renovation and repairs. With the escalating heating costs of its huge, inefficient interior open spaces, the Church also generally ran an operating deficit.

Decision to demolish.

By 1980 — again, before the Landmarks Preservation Commission evidenced any interest in the Church's building — the Church had decided to demolish the church building and construct a new building. The new building would include new, modern and safe facilities which the Church presently lacks — (1) adequate program and meeting rooms; (2) a fire safety sprinkler system and fire enclosed stairways as required in the New York City building codes for buildings built today; (3) an elevator for the children, the elderly and the handicapped, etc.; (4) kitchen and lavatory facilities; (5) handicap facilities; and (6) a smaller sanctuary. It could also include residential

housing units which would provide the funds necessary for the construction of its new building and which could also provide operating income for the Church and its programs.

Local residents around the Church learned of the Church's decision to demolish, and a Preservationist movement was mounted to persuade the Landmarks Preservation Commission to stop the demolition by designating the church building a landmark. The Church strenuously objected to the proposed designation, but over those objections the Commission designated the church building a landmark on November 24, 1981, completely ignoring the physical and financial problems which the designation would produce. The Commission claimed it could not examine this data until the "hardship proceeding."

The Church's lawsuit.

Promptly following the landmark designation the Church brought suit against the Commission in the New York State Supreme Court, New York County. The suit was brought on the ground that because of (a) the severely deteriorated condition of the building, (b) the threat to safety, (c) the total lack of financial resources of the Church to repair and renovate the building as required, and (d) the lack of adequate facilities for its worship and programs, the landmark designation impeded the work of the Church and was therefore unconstitutional since it substantially interfered, physically and financially, with the ability of the Church to carry out its religious programs. The Commission opposed the suit, not on the ground that the Church lacked a "hardship," but rather on the ground that the "hardship" should first be processed by the Commission in its own administrative "hardship proceeding."

The litigation was finally decided against the Church by the New York Court of Appeals by a 4-3 court (*Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510 (1986) on the basis that the case would not be "ripe" until the Church brought a "hardship" proceeding before the Commission and gave the Commission an opportunity to examine the financial and physical hardship of the Church in that proceeding, since the

court erroneously asserted the Church was simply renovating its building, not re-building anew. The lengthy dissenting opinion, however, argued that saving a small piece of the Church was not "renovation," and that the Church's uncontested financial and physical hardship meant the landmark designation was unconstitutional as applied. The Church filed a petition for certiorari with the U.S. Supreme Court, which was denied. *Cert. denied*, 479 U.S. 985 (1986). That litigation occupied almost five years and, despite help from other Methodist congregations, it cost the Church approximately \$35,000 in legal fees, further reducing the Church's small endowment to less than \$100,000.

After the litigation was over, the Church looked again at its options, in light of its purposes and programs as a religious congregation, its safety problems, the advancing deterioration and enormous renovation and operational costs of its building, and its almost total lack of funds. Its membership strongly reaffirmed the decision to demolish and rebuild in order to carry out its mission. The Church confirmed with real estate consultants that although it had no significant funds, the value of its land would easily support the financing necessary for the demolition of the existing building and construction of a new building, whether the work was done by a developer or directly by the Church acting as its own builder. Hence, the Church's plan to demolish and rebuild was wholly feasible.

The Church's hardship proceeding.

Although the Church had made a final decision to demolish and rebuild, its ability to complete the planning for its new building was severely hampered because of uncertainty as to whether the Commission would confirm the Church's hardship and grant the Church a permit to demolish. Architectural and consultants' fees for plans, advice and information represented significant and difficult costs for this congregation with virtually no funds and no guarantee of being able to go forward, even after spending those sums.

Since the Church's hardship was manifest — in light of its huge repair and renovation costs and its lack of funds — the Church determined that the proper sequence of steps would be first to file the hardship proceeding with the Commission and establish its "hardship" under the Landmarks Law in order to be free to complete the arrangements for demolition and construction. The Church was following the judicial hardship test established by the New York courts in *Matter of Trustees of Sailors' Snug Harbor v. Platt*, 29 AD2d 376 (1968), and confirmed by *Lutheran Church v. City of New York*, 35 NY2d 121 (1974), and *Matter of Society for Ethical Culture v. Spatt*, 51 NY2d 449 (1980), by showing that the maintenance of the building substantially interfered, physically and financially, with the religious purposes and programs of this Church. As shown in *Sailors' Snug Harbor, supra.*, that test was to be applied in light of the purposes and resources of the Church.

Hence, in November 1988 the Church filed a hardship proceeding before the Commission, asking for a determination that a financial and physical hardship existed and requesting a permit to demolish. The Church presented an application of well over 100 pages, including an architectural/engineering report showing that the cost of repairs and renovations needed to preserve the existing building and make it usable would total over \$8,000,000. The Church had only approximately \$100,000. The application also included detailed photographs of the exterior and interior of the church building, with graphic illustrations of the deterioration and deficiencies of the building (including safety problems), and also carefully showed the myriad ways in which the deficiencies of the building impaired the programs of the Church.

During the course of the hardship proceeding the Commission itself asked the New York City Department of General Services to inspect the building and evaluate the Church's claims as to repair and renovation costs. The Department of General Services essentially confirmed the enormity of those costs, identifying total projected costs of over \$6,000,000, which the DGS report concluded could be expended in three phased periods and would cover, first, the most urgent costs, second, additional costs

which could be briefly deferred, and third, costs of the building improvements needed to meet the Church's program requirements. When contingency and financing costs omitted by the DGS report are factored into the DGS estimates of total repair and renovation costs, the total costs calculated by the DGS report and by the Church's own architectural/engineering study are close. And even if the costs were only \$6,000,000 rather than \$8,000,000 the Church still had only \$100,000.

Nevertheless, the Commission found *against* the Church in the hardship proceeding, on the ground that regardless of the physical condition of the building or the financial condition of the Church, the Church had not shown that it had exhausted all alternatives short of demolition. This was based on testimony by preservationist groups, who urged that those alternatives might have included the following: renting space to various profit making and non-profit enterprises to raise money, embarking on a massive multi-year fund raising campaign aimed at raising the millions of dollars needed for the renovation, or demolishing only part of the building and constructing a new building around the saved structure.

In fact, those very alternatives had been explored by the Church, as shown in the massive documentation and testimony before the Commission. In addition, it is obvious that the adoption of these alternatives would force the Church to cancel its own programs, spend all of its time and energy on a dubious fund-raising program, and forfeit the value of its property in order to save part of the building.

The Commission also concluded that it could not evaluate the hardship imposed on the Church by the physical condition of the existing building until the Church submitted to the Commission detailed studies of the program facilities which would be provided the Church in the new building, apparently to see if these facilities could instead be fitted into the present building. This remarkable conclusion evidently assumed that the Church has the option of staying in its current building and repairing and renovating it, even though the Church has virtually no funds. Furthermore, as stated before and as the Church showed

in the hardship proceeding, the very reason the proceeding was brought at that time was that the Church lacked the funds needed to complete its detailed plans for the new building and that the uncertainty of the Church's right to demolish under the Landmarks Law significantly interfered with the Church's ability to complete that planning process. The congregation knew it could not afford to spend more of its meager funds until it learned whether it could go forward.

The Commission in fact has tried to substitute its own purpose of architectural preservation for the religious purposes for which these funds were originally given by the donors and to which the congregation is seeking to apply them. The Commission has taken this property for its own purposes.

The Commission's hearing process.

The Commission's 66 page determination attempts to give the impression that some form of judicial due process had been followed, leading to a careful evaluation of the evidence offered with a final decision by a neutral party. Such a process would have given the standard protections to the parties involved, particularly the applicant. Nothing could be further from the truth.

In fact, the hearings consisted simply of the Commission's gathering of statements, both documentary and testimonial. The Church's opponents were allowed to submit any testimony on any subject; none of the testimony was sworn; and in many cases the person submitting the testimony or statement was not even present. The Commission denied to the Church any right of cross-examination and allowed into the "record" any statement, oral or written, without regard to relevancy or truthfulness or evidentiary basis whatsoever. As a result, the "record" of materials in opposition to the Church's application is not a record in any judicial or even administrative sense but is merely an aggregation of letters, statements, studies, memoranda, and other materials (many of which are untrue and have no factual basis) submitted by the Municipal Art Society, the Landmarks Conservancy, and other preservationist organizations and their supporters. Those unsupported statements were then generously paraphrased or summarized by the Commission in creating the

so-called record of the proceedings incorporated into the Commission's formal determination. Yet this so-called record could never be a reliable basis either for a court determination or for an administrative determination which could be sustained on court review.

For example, opposing witnesses simply asserted that the Church could relieve its lack of funds by going out and raising money or selling its air rights. The witnesses provided no basis for these assertions other than vague speculation. With no cross examination permitted, that untested material is reported in the Commission's determination as though it was "evidence" supporting the Commission's determination.

That speculation and opinion was then used by the Commission in its final determination. For example, the determination stated the Commission had "been informed" of the Church's "refusal to explore community offers to raise significant funding on behalf of the Church." During the hearing witnesses speculated that the community might be able to raise funds for the Church, even though the Church had no money to rebuild. The Church was not allowed to cross examine those witnesses, and the claim that the community could raise anywhere near the funds needed by the Church never rose beyond the level of sheer wishful thinking.

Similarly, the determination asserts that the Commission "had been informed" of the Church's "refusal to consider proposals for development that would require only partial demolition." By denying the Church the right of cross examination, the Commission again barred the Church from revealing that the witnesses who alluded to the possibility of partial demolition were again simply speculating or acting in their own financial interests to the detriment of the Church. One proposal discussed at length in the determination would have had the effect of taking 85% of the value of its property away from the Church.

Since the Commission grants full latitude to witnesses regarding the quality, character and source of evidence asserted — i.e., hearsay, even opinion and speculation is permitted — the right

of cross examination becomes a vital part of the process. Without cross examination, the Commission has no basis whatever on which to evaluate the evidence. The need for cross examination is underlined when one realizes that many of the witnesses were from preservationist groups whose goal, we submit, was — as was the Commission's — to preserve the Church's building rather than to deal with the needs and purposes of the Church.

The Commission's absence of neutrality.

The Landmarks Preservation Commission's stated goal is to preserve buildings. Nevertheless in a "hardship" proceeding deeply affecting the life of a church and the multitude of people which this Church serves through its programs, surely the Church was entitled to have the judge of the facts — i.e, the Commission — manifest neutrality and a fair balancing of interests. In reality the Commission was anything but neutral. Instead it functioned as the strong advocate of preservation at the same time it was performing the formal role of judge and jury in the hardship proceeding. Under the Landmarks Law, the question of "hardship" concerned this Church and its own needs and purposes. The hardship proceeding, however, turned into nothing more than a town meeting chaired by the Commission and devoted to the question of how to "save" the Church's building regardless of whether the Church could maintain or function in the building, and the Church was pejoratively labeled by Commissioners and their supporters a "developer." As one Commissioner stated in the hardship hearing: "I suppose we could say it is the Developmentalist versus the Preservationist."

There was absolutely no interest on the part of the Commission and the preservationists as to how the Church's building interfered with the purposes and programs of the Church. They virtually ignored the massive amount of the Church's testimony and that of its supporters as to the damage being done to the Church's religious life and programs for the poor, the homeless, etc. There was indeed no balancing of interests whatsoever. The Commission demonstrated constant concern with only the building as though it were the most important aspect of the Church and the Church, accordingly, had to justify any change

in the building whatsoever. There was never any consideration of the Church's purposes and no recognition by the Commission of its burden of justifying interference with those purposes.

The Commission, throughout the proceedings, attempted to present itself as the neutral judge, with the "public" on one side, the Church on the other side, the Commission merely attempting to judge between them. In fact, the opponents were not the general public but were primarily avowed preservationist groups with close ties to the Commission. As the Church showed at the hearings, there was great support for the Church among the general public, which included the religious community and the large numbers of people the Church serves through its programs.

The Church's hardship.

Only the most tortured reasoning permits the conclusion that the Church did not prove its hardship. Indeed, as noted above, the New York City Department of General Services found approximately \$6,000,000 in needed renovation costs, and the Church had only \$100,000. Those plain facts constitute the hardship.

Effect on the Church of the Commission's actions.

By insisting on landmarking the Church's decayed building, by opposing the Church's efforts in the courts to have the landmark designation lifted, and by ignoring the Church's proof of hardship in the recently completed hardship proceeding, the Commission has frozen the Church into its present building, controlling the Church's mission by effectively forcing the Church to spend its funds and resources to keep up the decayed structure. The Commission has thereby substantially interfered with the Church's carrying out its religious and social programs and purposes for which it was created.

Central to the decision by the court of appeals in the proceedings herein below was the proposition that landmarks regulation is acceptable so long as it does not interfere with the *historical* use of the property. The court of appeals indicated

that the Landmarks Law may "freeze" a church's property and usage so long as the church can continue its present activities. *St. Bartholomew's Church v. City of New York*, 914 F.2d at 356. The Landmarks Preservation Commission has consistently followed this thinking in its dealings with the Church of St. Paul and St. Andrew.

One must look at the history of Church of St. Paul and St. Andrew to see what this "freezing" principle means to it. This has been a church devoted to mission and service to its congregation and to the needy of the community about it. Whenever those needs have changed, the Church of St. Paul and St. Andrew has changed. This is, in fact, the third building that this congregation has occupied. The irony is that if the Landmarks Law had been in effect a long time ago, this congregation might well have been frozen into a different and smaller building and the current building would never have come into being. The massive programs that are being carried on by this Church for the hungry, the destitute and the homeless might likewise never have come into being. The Church would have been frozen into the outdated usage of an older building and an outdated ministry. Churches have always been able to express their faith through their works. To freeze churches into doing only what they have done in the past completely blocks their new expressions of that faith.

One must look at the role of the churches and synagogues in our cities today. They are among the key providers of help to the needy. This is a main part of their religion. The decision of the court of appeals below states "No one seriously contends that the Landmarks Law interferes with substantive religious views." 914 F.2d at 354. In forcing the Church of St. Paul and St. Andrew and others in the religious community to abandon those programs which they believe they are called by their faith to do, the Landmarks Law is, in fact, dictating a new religious basis to them. The change of buildings for the Church of St. Paul and St. Andrew is not only an expression of its religious faith but the direct continuation of it. The decision of the court of appeals below states that Supreme Court decisions indicate that "government may not coerce an individual to adopt a certain belief . . ." 914 F.2d at 354. Forcing the Church of

St. Paul and St. Andrew and others in the religious community to change their purposes and, instead, expend their time, energies and funds on fundraising and caring for buildings to the detriment of what they feel called upon to do with those resources, is indeed forcing them to adopt a belief in practice if not in fact.

The decision below also states: "The central question in identifying an unconstitutional burden is whether the claimant has been denied the practice of his religion or coerced in the nature of those practices." 914 F.2d at 355. To force the Church of St. Paul and St. Andrew to adopt the purposes of architectural preservation against its will and belief is certainly coercing it. To force that Church to take all of the value of its property and commit it instead to architectural preservation and ignore the massive needs of the society around it is forcing that Church to act contrary to its religious beliefs.

The *Penn Central* decision, *supra.*, discusses percentage of profits and a reasonable return on landmarked property. But the Church of St. Paul and St. Andrew is not a commercial venture seeking profits and a reasonable monetary return. Ironically, that is exactly what the preservationists would have this Church become. They have consistently urged the Church to make money by renting out its space to theaters, artists, branch libraries, discotheques, doctors, accountants, etc. This would, of course, displace and terminate all of the Church's programs for its congregation and the needy whom it serves. It should be noted that rentals, profits, and reasonable monetary returns have never been a part of the "historic use" of this property.

For the Church of St. Paul and St. Andrew, the "return" on the Church's property rests on how much the Church can do for its congregation and the many people that it helps. Funds have been given to this Church through the decades for the good works that it does for others. This is the "historic use" of this Church's property and resources, not the maintenance of a building. To deprive this Church of its resources to help others is to take the value of its property for the purposes of others. In the case of the Church of St. Paul and St. Andrew, this

property holds out the possibility of enlarged feeding programs, shelters for the homeless, affordable housing, drug rehabilitation and education programs, AIDS programs, and countless other programs that this Church has been wanting to do for well over a decade and has been prevented from doing by the preservationists.

Had this Church not been landmarked, it could have brought in substantial funds over the last decade for its religious purposes and mission. To say that all this Church will ever have the right to do is just what it was doing in 1980 is to take away all of those programs and possibilities. This, in fact robs the Church of the bulk of the value of its property and thereby most of the possibilities for carrying out its faith and mission. Those elements are inextricably bound together.

The Church of St. Paul and St. Andrew is now left with the choice of going to court again (with virtually no funds to finance that effort), or re-applying to the Commission with a new application, including all of the legal and professional fees necessary. The prior hardship proceeding covered almost six months (November 1988 - May 1989). There were three public hearings, and five additional Commission meetings dealing with the Church's application. Legal and architectural fees for the Church amounted to approximately \$75,000 — a tremendous "hardship" for a virtually destitute religious institution. In addition, the Commission has yet to tell the Church what is acceptable to the Commission or to provide clear procedures or guidelines, leaving the prospect that the Church could be turned down on repeated applications. There is every expectation that the opponents will similarly do everything possible to block any new application by the Church, to prolong the proceeding, and to escalate the costs and thereby deplete the Church's resources and determination, forcing it to give up the fight and take whatever the Commission will allow. The Church obviously faces vast additional expense in further proceedings before the Commission and very possibly in the courts.

Entanglement.

In examining this Church's landmark proceedings it becomes clear that the purpose of the Commission was to get into the decision-making process of the Church of St. Paul and St. Andrew in order to compel the Church to devote its resources to the maintenance of its building "for the public good." As one Commissioner stated in the hardship hearings of this Church, "We see landmarks as a public good." The Commission did not consider the Church's hardship but focused solely on preserving the building. It now requires the Church to spend considerably more money in preparing plans for its new facilities and returning to the Commission with a new application. The Commission says it will then perform a programmatic evaluation of those new facilities. It has also suggested that the Church carry out studies on fund raising for the millions of dollars needed, all of which only add more time and expense for the Church.

That insistence on programmatic evaluation deeply and profoundly entangles the Commission in the religious purposes and programs of the Church. By conditioning its permit to demolish on its determination as to the need and arrangement of the Church's programmatic facilities, the Commission effectively exercises control over what those facilities will be.

Similarly, by requiring that the Church first commit itself to a massive, multi-year, multi-million dollar fund-raising program before the Commission will acknowledge that the Church's lack of funds is a major factor in its hardship, the Commission is seeking to determine how the time, energies and resources of the congregation will be spent. By insisting that the Church consider renting out substantial parts of its space or selling its air rights (for which there are no known buyers), the Commission is seeking to control the Church's finances and force funds to be used for the Commission's purposes.

The Commission's control of the Church has now become far more pervasive with the Commission's rejection of the Church's hardship application and with the conditions imposed in that rejection. The Commission has deepened its entanglement in the Church's religious purposes, programs and finances.

CONCLUSION

The experience of the Church of St. Paul and St. Andrew at the hands of the Commission reflects a policy of the Commission that a religious institution and its mission may be "frozen" into a landmarked structure in order to preserve the structure regardless of the detrimental impact on the religious institution. The Commission has substantially interfered with the Church of St. Paul and St. Andrew's carrying out its religious and mission programs and purposes for which it was created and has sought to substitute other purposes. The Commission has taken this Church's property for its own purposes of architectural preservation. In so doing, it has become entangled in the religious purposes and programs of the Church of St. Paul and St. Andrew.

It is submitted that this unyielding preservation policy has been similarly applied to St. Bartholomew's Church, the petitioner herein, with the same results.

For these reasons, the Church of St. Paul and St. Andrew urges that the petition for certiorari be granted.

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